173 (2)

No. 10-268

IN THE

Supreme Court of the United States

IAC/INTERACTIVECORP, a Delaware corporation; HOME SHOPPING NETWORK, a Delaware corporation; HSN LP, a Delaware limited partnership; HSN GENERAL PARTNER LLC, a Delaware limited liability company,
Petitioners,

v.

COSMETIC IDEAS, INC., a California corporation doing business as SWEET ROMANCE JEWELRY MANUFACTURING,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent Cosmetic Ideas, Inc. notes that it has no corporate parent or publicly held company owning 10% or more of the corporation's stock.

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REASONS WHY THE COURT SHOULD DENY THE PETITION

The Court should deny the petition for three principal reasons: (1) the underlying action has been dismissed, so there is no longer a case or controversy; (2) the split among circuits alone is not sufficient reason to grant the petition; and (3) in the last term, the Court decided another case concerning the statute at issue, which while not dispositive of the precise question presented, offers more than ample guidance on the resolution of this issue by the circuit courts of appeals, including the circuit court below, which followed that precedent.

1. THERE IS NO CASE OR CONTROVERSY REMAINING, AND HENCE NO SUBJECT MATTER JURISDICTION

On September 15, 2010, the district court entered an order dismissing the action, following a settlement of the underlying dispute. The parties expect to file a stipulation with the district court, making the dismissal with prejudice.

The case is moot. There thus is no case or controversy remaining, and therefore no subject matter jurisdiction. U.S. CONST. Art. III, § 2, Cl. 1. A case must exist at all the stages of appellate review. Preiser v. Newkirk, 422 U.S. 395, 401 (1975); Mills v. Green, 159 U.S. 651, 653 (1895). At this stage, no case exists.

2.
THE SPLIT AMONG CIRCUITS IS NOT SUFFICIENT GROUNDS FOR GRANTING THE PETITION

Rule 10 of this court specifically states that the reasons enumerated in paragraphs (a) through (c)—such as if a United States court of appeals has entered a decision in conflict with the decision of another United States Court of appeals—indicate the character of the reasons the Court considers, "although neither controlling nor fully measuring the Court's discretion."

The present statute, section 411(a) of the Copyright Act, 17 U.S.C. § 411(a), was enacted in 1976, and went into effect in 1978. The predecessor statute, section 13 of the Copyright Act of 1909, was similar, ending with this sentence: "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of [Title 17 of the United States Code] with respect to the deposit of copies and registration of such work shall have been complied with."

The Ninth Circuit had earlier decided the issue of satisfaction of the Copyright Act's registration requirement, Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970), but that precedent was not controlling on the matter, because it was interpreting the applicable provision of the 1909 Act, which differed from that in the 1976 Act.

The decision of the court of appeals below, Cosmetic Ideas, Inc. v. IAC/InterActiveCorp., 606 F.3d 616 (9th Cir. 2010), nevertheless came to the same conclusion, namely, that receipt of the copyright registration application materials (form, fee, and

deposit copy or copies) by the Register of Copyrights is sufficient. This has been termed the "broad" or "application" approach, in contrast to the "narrow" or "registration" approach.

But even before there was a split among circuits between the former (e.g., Apple Barrel Prods. v. Beard, 730 F.2d 384, 387 (5th Cir. 1984)), and the latter (e.g., La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1197-98 (10th Cir. 2005)) under section 411(a) of the 1976 Act, there had been a split of authority under section 13 of the 1909 Act as well. For while the Ninth Circuit in Roth Greeting Cards held that "[i]f these steps have been properly performed it is the duty of the Register of Copyrights to issue a certificate of registration under the seal of the copyright office," in Vacheron & Constantin-le Coultre Watches, Inc. v. Benrus Watch Co., Inc., 260 F.2d 637 (2d Cir. 1958), it was the dissenting opinion of the Chief Judge that held "[n]ote that 17 U.S.C. 13 says nothing about the necessity for purposes of suit of this certificate, so fully described in purpose and effect in 209. The whole implication throughout is that the Register must carry out the provisions of the law and has no judicial or discretionary functions."

The two appellate decisions which adopted different approaches to the issue of registration as a condition precedent to instituting an action under the 1909 Act were decided 12 years apart, and the apparent split in authority continued until at least the enactment of the successor statute eight years later, and the copyright bar survived. The case below is moot. Petitioners argue that "[t]he basic nature of this Circuit schism makes it unlikely that it can be resolved without inervention by this Court." That is not true. It

simply would take another district court following the "narrow" or "registration" approach of another court of appeals for a test case to determine whether those precedents have any further validity. The decision by the court of appeals in this action demonstrates that its reasoning properly follows the decisions of this Court.

3.
A RECENT RULING BY THIS COURT LEAVES NO DOUBT THAT THE NINTH CIRCUIT DID NOT ERR

Last term, this court decided another case concerning section 411(a) of the Copyright Act, Reed Elsevier, 559 U.S. __, (2010). After the court of appeals had heard oral argument of the appeal in this action, the appeal was withdrawn from submission, because the following day this Court had heard oral argument in Reed Elsevier. The court of appeals ordered counsel to submit simultaneous supplement briefs, limited to 10 pages, within 30 days of this Court's decision in Reed Elsevier advising the court of the effect, if any, of that decision on this case.

Although the unanimous decision in Reed Elsevier specifically declined to decide the issue presented by this case, because it was not before the Court, the Court's reasoning was equally applicable. The court of appeals simply followed the logic of Reed Elsevier, which in turn followed a precedent in a non-copyright case, Arbaugh v. Y & H Corp., 546 U.S. 500, 515-16 (2006).

4.
THE SPLIT AMONG CIRCUITS HAS NO APPRECIABLE EFFECT ON THE OPERATIONS OF THE COPYRIGHT OFFICE

In support of their contention that the United States government should be heard on an issue that will significantly impact the role of the Copyright Office, petitioners include as Appendix D remarks made by the General Counsel of the Copyright Office. Close examination of those remarks reveals that they do not support petitioners' argument.

As a preliminary matter, those remarks were made on February 3, 2010, before this Court decided Reed Elsevier. Mr. Carson addresses three benefits of the copyright examination and registration system. As to the first two of these, augmenting the collection of the Library of Congress and creating a public record of claims, it does not matter whether in a particular jurisdiction, the courts apply the registration or application approach; either way, plaintiffs submit deposit copies and the necessary information.

As to the third benefit, examination of the application, the number of instances in which copyright registration is denied is small—less than one or two percent—and not all of that small fraction is attributable to uncopyrightatble subject matter. Also, the Register's opinion is not conclusive. So obtaining an advisory opinion in less than one or two percent of instances—a number further reduced by the fact that only a fraction of copyrights are ever litigated at all—does not constitute a "significant" impact on the Copyright Office's role. The main benefits of the registration system are achieved under either

approach. Whatever benefit the registration approach has over the application approach, it is minimal at best.

CONCLUSION

There is no reason to review the Ninth Circuit's decision, when the case is moot, the decision below correct, and the split among circuits is not sufficiently important.

October 21, 2010

Respectfully submitted,

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